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15 CITY OF BURBANK

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

17 **COUNTY OF LOS ANGELES**

18
19 WILLIAM TAYLOR,

20 Plaintiff,

21 vs.

22 CITY OF BURBANK,

23 Defendant.

Case No: BC422 252

[Assigned to: Hon John L. Segal – Dept. 50]

**DEFENDANT'S REPLY TO PLAINTIFF'S
OPPOSITION TO MOTION TO TAX COSTS**

Date: June 19, 2012

Time: 8:30 a.m.

Dept: 50

Action Filed: Sept. 22, 2009

Trial Date: March 5, 2012

1 **I. INTRODUCTION AND SUMMARY**

2 Defendant City of Burbank ("City") moved to tax \$37,370.47 in costs from plaintiff's
3 puffed up Memorandum seeking \$49,046.28, and thereby reduce the properly allowable costs to
4 \$11,675.81. Plaintiff's opposition conceded that two items should be taxed (\$29,615 in expert
5 fees, and \$52 in transcripts not ordered by the Court) and withdrew them, reducing his request to
6 \$19,379.28. Nevertheless, with a small exception, plaintiff failed to meet his burden to justify
7 most of the remaining costs the City argued should be taxed.

8 Indeed, the opposition was notable in revealing that plaintiff had lumped in messenger
9 and/or FedEx delivery fees in three different categories on the Memorandum of Costs, seemingly
10 hoping that some of them would slip through somewhere. The Court should tax plaintiff's
11 Memorandum of Costs as requested by the City as follows:

12 First, the messenger and delivery costs improperly lumped into court and filing fees
13 section of the memorandum should be taxed, as should an ex parte filing fee that plaintiff
14 provided no attempt to meet his burden to justify;

15 Second, plaintiff concedes that his Memorandum failed to list a \$236.48 jury fee charge
16 that was included in the total, and he failed to include an invoice supporting that additional
17 amount to meet his burden of justifying the expense;

18 Third, \$135 in costs for extra copies of a deposition video should be taxed;

19 Fourth, service of process charges should be reduced to eliminate the messenger charges
20 for which a proper showing has not been made, and FedEx charges, which are prohibited. Costs
21 for service upon Stehr, and service upon a non-party attorney should also be taxed;

22 Fifth, plaintiff conceded and withdrew his request for expert fees as costs;

23 Sixth, plaintiff's excessive copying costs for trial exhibits should be greatly reduced to
24 reflect the fact that plaintiff only admitted 11% of the pages in the overly inclusive exhibit
25 volumes he copied; and

26 Seventh and finally, all of the expenses listed under Other in the Memorandum are non-
27 recoverable and should be taxed in their entirety.

1 **II. THE COURT SHOULD TAX COSTS NOT ALLOWED BY LAW OR NOT**
2 **REASONABLE OR NECESSARY**

3 Plaintiff does not assert any impropriety in the motion to tax costs nor does he dispute any
4 of the law cited by the City on the general burdens surrounding a motion to tax costs. Costs
5 should only be allowed if "reasonably necessary to the conduct of the litigation rather than merely
6 convenient or beneficial to its preparation." CCP § 1033.5(c). Once items are properly objected
7 to and put in issue by the moving party, the burden is on the party claiming them as costs. *Ladas*
8 *v. California State Auto Assn.* (1993) 19 Cal.App.4th 761, 774-776 Indeed, even the statute
9 permitting recovery of costs "as a matter of right" authorizes a trial court to disallow recovery of
10 a cost if the court determines that the fee was not reasonably necessary to litigation. *Perko's*
11 *Enterprises, Inc. v. RRNS Enterprises* (1992) 4 Cal.App.4th 238, 244-245; CCP § 1033.5(a),(c).
12 Whether a cost item was reasonably necessary is a question of fact to be decided by the Court.
13 *Ladas, supra*, 19 Cal.App.4th at 774.

14 **A. "Item 1: Filing and Motions Fees" Should Be Reduced To \$695**

15 Plaintiff concedes that he has puffed up his "filing and motion fee" costs in Item 1 with
16 several items which his opposition acknowledges were not filing and motion fees, but were
17 actually fees for messengers or other delivery charges. [See Oppos. Smith Decl., Ex. 1.] Since
18 plaintiff cannot then meet his burden of justifying these costs as filing and motion fees as they
19 were listed in the Memorandum, the Court need go no further, and should tax all but \$695 from
20 Item 1 in the Memorandum of Costs.

21 Each of these items, which plaintiff concedes actually represent messenger fees, not filing
22 fees, should be taxed: \$273.12 for opposition briefs or objections which were not filing fees. [See
23 Motion, Tyson Decl., Ex. A, Item Nos. 1f, 1i, 1j, 1r, 1s, pp. 2, 5.] \$16.50 for a reply brief [Id.,
24 Item Nos. 1c, , p. 2.], \$165.75 in messenger fees for *Pitchess* and Discovery Motions [Id., Item
25 1b], \$10.50 for a Joint Status Report [Id., Item 1n], and \$20 for Plaintiff's List of Stipulated Facts
26 [Id., Item 1t].

27 Plaintiff cites one case in which a Court approved some messenger fees as a
28 miscellaneous cost found to be reasonably necessary. However, in that case, the attorney for that

1 party provided a detailed declaration convincing the court that he had “provided substantial
2 evidence that the charges were reasonably necessary.” *Ladas, supra*, 19 Cal.App.4th at 774. In
3 this case, Mr. Smith’s declaration provides no such substantial evidence of why such charges
4 were reasonably necessary. Indeed, Mr. Smith never even declares generally that his messenger
5 fees were reasonably necessary. He just attached a list of the charges. [Opposition, Smith Decl.,
6 ¶ 2, Ex. 1.] Plaintiff has not sustained his burden.

7 Regarding his claim of \$53.50 for the filing of his “Government Claim” [Tyson Decl.,
8 Ex. A, Item Nos. 1e, , p. 2], plaintiff asks the Court to note that preparation of a Government
9 Claim is a pre-requisite to filing a lawsuit under *Government Code* § 1102.5. But he neglects to
10 mention that such claim is filed with the public agency that may be sued—not with the Court.
11 Plaintiff does not provide any notes that would give the Court jurisdiction to award costs that
12 were not incurred as part of the Court action, itself. This item should be taxed.

13 Finally, although the City directly raised the propriety of a \$40 filing fee for an
14 unspecified “Ex Parte Hearing” [Id., Item 1k], plaintiff has offered no explanation of what it was
15 for or why it was reasonably necessary in this litigation.

16 As such, all of the above identified costs should be taxed and the amount of filing fees
17 awarded to plaintiff as costs reasonably necessary to the litigation should be reduced to \$695.

18 **B. Item 2: Jury Fees Were Incorrectly Totaled**

19 Plaintiff’s opposition concedes that total amount jury fees requested in his Memorandum
20 of Costs exceeded the individual payments listed by \$236.48. Plaintiff claims he paid the
21 additional amount. But despite having his total jury fees challenged by the Motion, he failed to
22 attach any invoice or check showing that plaintiff actually incurred the additional, unclaimed
23 \$236.48. In short, plaintiff failed to properly claim the \$236.48 on his Memorandum, and failed
24 to meet his burden to properly justify that additional amount in opposition to the Motion to Tax
25 Costs. Thus, Item 2 Jury Fees should be taxed and reduced by \$236.48 to an award of \$1024.96.

26 **C. Item 4: Deposition Costs For One Video Is Excessive**

27 Plaintiff provides a reasonable explanation for some of the excessive cost of the Magnante
28 Deposition. Nevertheless, it appears from the receipt that plaintiff did order extra, unrecoverable

1 features. *See Science Applications Int'l. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095,
2 1104 (costs in editing deposition video for more effective presentation is unnecessary and not a
3 recoverable cost). First, it appears that plaintiff ordered \$105 in extra copies in DVD and/or
4 MPEG formats, and \$30 in additional hard drive storage. [Opposition, Smith Decl., Ex. 3.]
5 Neither appears reasonably necessary for a witness who was never called to testify at trial, and
6 plaintiff does not offer any explanation for recovery of such costs.

7 The City submits that the allowable video cost of the Magnante Deposition should be
8 reduced by \$135.00 to \$403.20. As such, Deposition costs should be taxed and reduced to
9 \$5,337.80.

10 **D. Item 5: Service of Process Costs Should Be Reduced To \$250**

11 Plaintiff's requested costs for Service of Process should be taxed and reduced to \$250.

12 **1. The Hidden FedEx and Messenger Costs Should Be Taxed**

13 Plaintiff again concedes that hidden amongst the costs requested in this category were
14 more messenger and delivery charges that do not qualify as service of process. [Smith Decl., ¶ 8,
15 Ex. 6.] Each of these items should be taxed, including "other" service charges for serving the
16 "Burbank Police Department" for \$167.69, and the "Office of the City Attorney" for \$248.54
17 [Tyson Decl., Ex. A, Items Nos. 5(a) and (c), p. 3], and also including charges of \$295.59 and
18 \$160.43 for delivering documents to City's trial counsel, which was not necessary and should be
19 taxed. [Id., Items Nos. 5(d) and (f), p. 7] and \$17.75 for unspecified service for a third law firm
20 [Id., Item No. 5(g), p. 7]. Indeed, plaintiff appears to have simply lumped multiple messenger
21 and FedEx bills for delivery of any letter or legal papers to each such office over the course of the
22 entire case into an improper request as costs for *service of process*. Plaintiff has essentially
23 conceded that these costs cannot be justified as service of process costs, as requested. They
24 should be taxed.

25 Moreover, as a matter of law, each of the federal express charges must be taxed because
26 they are expressly disallowed. *See CCP* § 1033.5(b)(3); *Ladas, supra*, 19 Cal.App.4th at 773-774
27 (postage not recoverable); *Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616, 1627 (federal
28 express and postage charges not recoverable). Plaintiff's opposition lists \$585.76 in

1 impermissible FedEx costs that must be taxed. [Oppos., Smith Decl., Ex. 6.]

2 Even if the remaining messenger delivery charges had been requested as miscellaneous
3 costs awardable in the Court's discretion, they should still be taxed. Plaintiff simply offers no
4 explanation for the necessity of the incurred charges in this case. He has certainly failed to
5 provided "substantial evidence that the charges were reasonably necessary" as required to justify
6 this expense. *Ladas, supra*, 19 Cal.App.4th at 774. Again, Mr. Smith just attached a list of the
7 charges. [Oppos., Smith Decl., ¶ 2, Ex. 1.] Plaintiff has not sustained his burden.

8 **2. The Cost of Service On Former Chief Stehr Should Be Taxed**

9 Plaintiff concedes that he seeks to recover a \$90 cost for unsuccessfully attempting to
10 serve former Chief Stehr that proved to be unnecessary because the City agreed to accept service
11 of the subpoena for him. As such, the Court should tax the \$90 for the service attempt to Tim
12 Stehr [Item No. 5(i)] as it was clearly not necessary. The City should not be charged a cost it
13 voluntarily offered to allow plaintiff to avoid incurring, even if plaintiff unwisely attempted
14 service before asking the City for free assistance.

15 **3. Unnecessary Service of Subpoena For Depositions From Other Cases**
16 **Should Be Taxed**

17 Finally, the City should not be charged \$40 for service of a subpoena upon Solomon
18 Gresen [Item No. 5(h).] Mr. Gresen is an attorney representing several other current or former
19 Burbank police officers in separate suits against the City. [Tyson Decl., ¶ 4.] Plaintiff suggests
20 in opposition that Mr. Gresen had depositions in his cases of some City employees who were also
21 witnesses in this case. However, he fails to offer any explanation for why attempting to obtain
22 such depositions by subpoena was reasonably necessary. In fact, plaintiff's counsel
23 acknowledges that he was aware that those depositions were under protective orders in those
24 other cases [Opposition, Smith Decl., ¶ 7]—which would seem to prohibit Mr. Gresen from
25 turning over such depositions, making the subpoena futile. Indeed, Mr. Smith's declaration does
26 not aver that he received the depositions, let alone made any use out of them at trial.

27 **E. Item 8.b: Expert Witness Fees Should Be Taxed**

28 Plaintiff's opposition concedes that \$29,615.00 in expert witness fees was improperly

1 included in the Memorandum of Costs and withdraws that request. [Opposition, p. 6.] As such,
2 the Motion to Tax should be granted as to these costs.

3 **F. Item 11: Models, Blowups, and Photocopies of Exhibits**

4 In Item 11, plaintiff seeks recovery of \$2,548.47 for trial exhibit duplication. [Tyson
5 Decl., Ex. A, p. 4.] The City should not have to cover unreasonable copying costs as a result of
6 plaintiff's over inclusiveness of unnecessary or inadmissible exhibits into his exhibit binders.

7 Under the statute, costs of photocopying exhibits are only recoverable if they were
8 "reasonably helpful to aid the trier of fact." CCP § 1033.5(a)(13), and it has been held that
9 documents do not meet that standard if not admitted at trial. *Ladas, supra*, 19 Cal.App.4th at 774.
10 Plaintiff notably does not dispute that he only had a total of 20 of his exhibits from his binders
11 admitted at trial for a total of 155 pages. Nevertheless, he copied 80 exhibits with a total of 1,422
12 pages.¹ In the end, less than 11% of the pages copied were admitted into evidence and can be
13 justified as reasonable and necessary costs. As such, City submits that this item of photocopy
14 trial exhibits should be proportionately reduced to 11% of the request-- \$283.33.

15 **G. Item 13: Other**

16 In this category, plaintiff improperly seeks recovery for a hodgepodge of costs that are
17 simply not recoverable under law. The opposition adds little attempt to justify the reasonable
18 necessity of these expenses. All of the listed costs in this Item should be taxed.

19 First, this is the third category in which plaintiff seeks messenger fees, with a \$186
20 charge. Despite being challenged by the City's motion, plaintiff offers no explanation of the need
21 for such discretionary costs. They should be taxed. *Nelson, supra*, 72 Cal.App.4th at 132. In
22 addition, the \$54.78 charge for Federal Express must also be taxed as discussed above. *Ripley,*
23 *supra*, 23 Cal.App.4th at 1627.

24 Plaintiff concedes that his requests for \$52 for transcripts of hearings on motions on
25 August 30, 2010 and September 27, 2010 should be taxed.. [Opposition, p. 7:10.] CCP §

26
27 ¹ Plaintiff's assertion that City's counsel (who drafted the motion) who was not at the trial must
28 not be aware that multiple copies of the binders were made is a non-sequitor. City's counsel
certainly understood that point, as the City's request for a percentage based reduction would
allow plaintiff to recover the costs for every copy of the admitted documents.

1 1033.5(b)(5); *Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, 440-442.

2 Similarly, plaintiff seeks award of \$216 for unspecified "Courtcall Appearances." This is
3 not an allowable expense under law. Plaintiff disingenuously argues that court appearances are
4 necessary. But he fails to note that costs associated with an attorney making a court
5 appearance—parking, mileage, and the attorney's time and fees— are themselves not recoverable
6 as costs *Ladas, supra*, 19 Cal.4th at 776 (routine travel expenses, including parking, for attorneys
7 is not a recoverable cost). Plaintiff provided no explanation why making the appearance by
8 telephone should transform the appearance into a recoverable cost. Using Courtcall is simply a
9 leading example of a cost that is "merely convenient" under CCP § 1033.5(c)(2) and not allowed.

10 Apparently, even plaintiff's counsel cannot recall what document he charged \$7.50 for
11 printing from the "Los Angeles Superior Court Online" as he offers no explanation, other than it
12 must have been related to the case. Plaintiff has not met his burden, and this cost should be taxed.

13 Finally, this leaves charges of \$1,499.50 for "Transcriptionist for IA interviews" and
14 \$1300.00 for "Interpreter & Certification Fees Re Interviews of David Romero and Jose
15 Alvarenga." Plaintiff acknowledges that both sizable entries relate to plaintiff's ill-advised
16 attempts to repeatedly attempt to bring into evidence purported transcriptions of translations of IA
17 interviews that ultimately proved fruitless. Plaintiff disingenuously avers that the papers were
18 used to refresh an unnamed witness' memory on some unstated point during trial. In truth,
19 plaintiff's counsel unsuccessfully tried every trick in the book to seek admission of these hearsay
20 exhibits. He never successfully succeeded in refreshing a witness' recollection from them
21 however, and no wonder. By seeking the costs of these transcripts and interpretation documents,
22 plaintiff's counsel admits that he had these document created. It would have been difficult, to
23 say the least, to refresh a witness' recollection from such newly created documents. Plaintiff's
24 vague assertions simply do not meet his burden to show that these costs were reasonably
25 necessary to the litigation. CCP § 1033.5(c)(2); *Ladas, supra*, 19 Cal.App.4th at 774. As such,
26 these costs should be taxed.

III. CONCLUSION

For all the foregoing reasons, the Court should tax \$37,167.27 of the claimed \$49,046.28 expenses from plaintiff's Memorandum of Costs and award \$11,878.81 in costs to plaintiff as follows:

<i>Item No.</i>	<i>Category</i>	<i>Claimed</i>	<i>Plaintiff Conceded</i>	<i>Amount to Be Taxed</i>	<i>Allowable Award</i>
1	Filing and Motion Fees	1,274.87		579.87	695.00
2	Jury Fees	1,261.44		236.48	1,024.96
4	Deposition Costs	5,472.80		135.00	5,337.80
5	Service of Process	1,270.00		1,020.00	250.00
8a	Witness fees - Ordinary	849.92		-	849.92
8b	Witness fees - Expert under 998	29,615.00	29,615.00	29,615.00	
11	Models, blow-ups and photocopies of exhibits	2,548.47		2,265.14	283.33
12	Court Reporter Fees as established by statute	3,438.00			3,438.00
13	Other (see Worksheet)	3,315.78	52.00	3,315.78	-
TOTAL		49,046.28	29,677.00	37,167.27	11,878.01

Dated: June 12, 2012

BURKE, WILLIAMS & SORENSEN, LLP

Ronald F. Frank

Robert J. Tyson

By


Robert J. Tyson
Attorneys for Defendant, City of Burbank

PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 444 South Flower Street, Suite 2400, Los Angeles, California 90071-2953. On June 12, 2012, I served a copy of the within document(s):

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO TAX COSTS

- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.
- ☒ by placing the document(s) listed above in a sealed OVERNITE EXPRESS envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to an OVERNITE EXPRESS agent for delivery.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 12, 2012, at Los Angeles, California.

/s/
Lisa J. Villarroel

SERVICE LIST
Taylor v. Burbank
LASC, Case No. BC422252

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